PP

v.

ABDUL WAHAB ABD JABAR & ANOR

HIGH COURT MALAYA, MUAR
JEFFREY TAN J
[CRIMINAL TRIAL NO: 45-7-00]
29 JANUARY 2002

CRIMINAL PROCEDURE: *Sentence - Principles of sentencing - Factors to consider - Concurrent or consecutive - Whether offence committed part of a single transaction - Whether mode of sentence within court's discretion - Criminal Procedure Code, ss. 282(d) and 292 - Mitigating factors*

Both accused pleaded guilty for causing the death of the deceased. The prosecution argued that the sentencing of both accused should reflect the seriousness of the crime committed and sought for a heavier sentence to run consecutively regarding the first accused ('OKT1') as he played a more active role. It was also submitted that OKT1 had been charged for a similar offence and sentenced by the court in another trial.

In mitigation, OKT1 sought for the sentence to run concurrently with the other trial as he had pleaded guilty to the present offence and had thus saved the court much judicial time. Similarly, second accused ('OKT2') submitted in mitigation of his guilty plea and the fact that the fatal blow was delivered by OKT1. He added that he was 36, HIV positive and has a wife with four children

Held:

[1] The taking of a human life is a most grave and serious crime which should be reflected by its punishment. Public interest would be the first and foremost consideration in deciding the appropriate sentence. Consideration would additionally be given to the nature of the offence, the circumstances in which it was committed, the degree of deliberation shown by the offender, the provocation factor where a violent crime was involved, the antecedents of the prisoner up to the time of the sentence, his age and character. (pp 336 b-3 & 337 b)

[2] Mitigating factors are not to be disregarded, even if the offence called for a deterrent sentence. However, public interest must not be relegated to the background. (p 336 g-h)

[2a] Whilst OKT1 had pleaded guilty and judicial time was saved, there were no extenuating circumstances for the court to be merciful. Both accused

showed no respect for life. They could have easily relieved the deceased of his wares without having to stab him in the neck with an ice pick. In the circumstances, the right and proper punishment was a term of imprisonment of nine years. (p 337 d)

[3] In relation to OKT2, the sentence shall commence from the date of arrest. (p 337 d)

[4] Sections 282(d) and 292 of the Criminal Procedure Code regulates the law relating to the position of a prisoner who has received more than one sentence of imprisonment. The effect of these two provisions is that the sentence is to run from the date it was passed unless the court states otherwise. Thus, the court has the discretion to decide whether the sentence was to run concurrently or consecutively. (p 337 f-i)

[4a] In deciding the appropriate mode, reference is had to ascertaining whether the offences were committed in the course of a single transaction. This is concluded by looking at the proximity of time and place, continuity of action and, continuity of purpose or design. (p 338 b-c)

[4b] Even if the offences were committed in quite separate transactions, the aggregate sentence imposed on an offender should not exceed the normal level of sentences given for the most serious of individual offences involved, and the total sentence should not be a crushing sentence not in keeping with the offender's record. (p 338 e)

[5] It was evidenced that OKT1 had been sentenced to nine years' imprisonment for a similar offence in another trial, to commence from the date of his arrest. The offence committed then and the one at present were distinct and separate. This was definitely a case where it could not be said that the sentences should be ordered to run consecutively. If the sentence for the present offence was to commence immediately, the effect would be that OKT1 would not be punished at all for his ghastly act. This would not be just, considering the unquestionable gravity of the present offence which could not go unpunished. (p 338 f-g)

[6] Whilst a consecutive sentence would result in OKT1 being imprisoned for 18 years, the aggregate sentence did not exceed the maximum punishable punishment for any one offence, taking into account his record of two culpable homicides. (pp 338 h & 339 a)

[First accused sentenced to nine years' imprisonment to commence consecutively from date of expiration of sentence in other offence. Second accused sentenced to nine years' imprisonment to commence from date of arrest.]

Case(s) referred to:
Amrita Lal Hazra v. Emperor 42 Cal 952 ***(refd)***
Chin Choy v. PP [1955] MLJ 237 ***(refd)***
Hyder v. Rex [1949] MLJ 121 ***(refd)***
Joginder Singh v. PP [1984] 2 MLJ 133 ***(refd)***
Lee Peng Kong v. PP [1986] 2 CLJ 139; [1986] CLJ (Rep) 437 ***(refd)***
Lee Yoke Choong v. PP [1964] MLJ 138 ***(refd)***
Low Oi Lin v. R [1949] MLJ 210 ***(refd)***
Mohamad Akmar Mansor v. PP [Mallal's Digest 4th edn, 1997 Revised, para 2573] ***(refd)***
Maideen Pillai v. PP [1996] 1 SLR 161 ***(refd)***
Mohamed Jusoh Abdullah & Anor v. PP [1947] MLJ 130 ***(refd)***
Ooi Sim Yim v. PP [1990] 1 CLJ 435; [1990] 1 CLJ (Rep) 223 ***(refd)***
PP v. Jafa Daud [1981] 1 MLJ 315 ***(refd)***
PP v. Khairuddin [1982] 1 MLJ 331 ***(refd)***
PP v. Loo Choon Fatt [1976] 2 MLJ 256 ***(refd)***
PP v. Mohd Nooh Yusof & Ors [Mallal's Digest 4th edn 1997 Revised para 2918] ***(refd)***
PP v. Ooi Wang San [1998] 3 CLJ 270 ***(refd)***
PP v. Yap Huat Heng [1985] 2 MLJ 414 ***(refd)***
PR v. Adam Mohamad [Mallal's Digest 4th edn 1997 Revised para 2908] ***(refd)***
R v. Kenneth John Hall 35 Cr App R 164 ***(refd)***
R v. Murukaiyan Rasoo [1957] MLJ 26 ***(refd)***
Reg v. WN Hammar [1958] 24 MLJ 4 ***(refd)***
Sia Soon Kia v. R [Mallal's Digest 4th edn, 1997 Reissue, vol 5 para 2585] ***(refd)***
Yap Teng Chai v. PP [1959] MLJ 205 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 282(d), 292(i)

Other source(s) referred to:
Halsbury's Laws of England, Hailsam edn, vol 9, para 365
Practice Note No 7 of 1961

For the prosecution - Haslinda Abu Bakar; AG's Chambers
For the first accused - C Sukumaran; M/s C Sukumaran & Co
For the second accused - Mohd Yamin Ismail; M/s Mohd Yamin Ismail & Partners

Reported by M Maheswaran

JUDGMENT

Jeffrey Tan J:
After the alternative charge (P3) was read and explained to them, both accused (OKT1 & OKT2) pleaded guilty to the following offence:

> Bahawa kamu bersama-sama pada 15 Julai 1999 pada jam lebih kurang 10.30 pagi hingga 11.30 pagi di ladang MCA Layang-Layang, Kluang, dalam Daerah Kluang, dalam Negeri Johor Darul Ta'zim, telah menyebabkan kematian

CHONG AH WA (K/P NO: 490109-06-5057) dengan niat menyebabkan kecederaan-kecederaan yang boleh membawa kematian. Oleh yang demikian kamu telah melakukan kesalahan homisid salah yang tidak terjumlah kepada membunuh yang boleh dihukum di bawah s. 304(a) Kanun Keseksaan dan dibaca bersama Seksyen 34 Kanun Keseksaan.

And after the statement of facts of the case (P4) that the learned deputy public prosecutor (Haslinda bt Abu Bakar) tendered was read and explained to them, both accused admitted the following: (i) at 10am on 15 July 1999, they proceeded on OKT2's motor-cycle to ladang MCA Layang-Layang, Kluang, (ii) they "stopped" beneath an oil palm tree at the road junction leading to ladang MCA Layang-Layang, Kluang, (iii) about ten minutes later, they saw the deceased passing by on a motor-cycle, (iv) they followed the deceased for about ten minutes, (v) when both motor-cycles were near each other, OKT1 kicked the motor-cycle of the deceased, and the deceased, as a result, fell off his motor-cycle, (vi) they got off their motor-cycle and scuffled with the deceased, in their attempt to rob the deceased of his wallet, (vi) in that scuffle, while OKT2 held onto the deceased, OKT1 stabbed the deceased on his throat with an ice pick taken from the rack of OKT2's motorcycle, (vii) they relieved the deceased of RM800, and, (viii) they left the deceased lying by the side of the road. Both accused also admitted that when they were arrested, an iron ice pick was in OKT1's sling bag, and that the deceased had died as a result of the wounds to his throat.

Pertinent to the facts of the case, the learned DPP also tendered two police reports (P5 & P6), a post-mortem report (P7), 13 photographs [P8(1-13)] of the scene, deceased's motor-cycle, deceased, and, a sketch plan of the scene and key (P9 & P9K), which were all admitted by both accused.

Being satisfied that both accused fully understood the nature and consequences of their plea, and admitted, without any qualification, the alleged offence against them, and that the alleged offence had been made out, the court accepted the plea of guilt and recorded a conviction.

Mr C Sukumaran, who mitigated for OKT1, pleaded for the sentence to be concurrent with the sentence to which OKT1 was sentenced by this court in criminal trial 45-8-2000. Mr Sukumaran said that OKT1 had pleaded guilty and so had saved much judicial time, and that the court must consider the totality of the sentences.

Mr Mohd Yamin bin Ismail for OKT2 said that OKT2 had pleaded guilty, and that the fatal blow was not delivered by OKT2. With regard to the personal factors of OKT2, Mr Mohd Yamin revealed that OKT2 is 36 years old, is HIV positive, and that OKT2 has a wife who is working in a factory, and has four children.

The opening remark of the learned DPP was that the accused had committed a serious crime. She said that the sentence must reflect the seriousness of the offence. "Mereka menunggu mangsa." "Terhadap OKT1, saya memohon hukuman yang lebih berat dan berturutan." "OKTI yang lebih aktif."

" ... in deciding the appropriate sentence ... the first and foremost consideration is the public interest" (*R v. Kenneth John Hall* 35 Cr App R 164; see also *R v. Murukaiyan Rasoo* [1957] MLJ 26). "If the court finds the accused guilty or if a plea of guilty has been recorded and accepted the court shall pass sentence according to law. A 'sentence according to law' means that the sentence must not only be within the ambit of the punishable section, but it must also be assessed and passed in accordance with established judicial principles" (*PP v. Jafa bin Daud* [1981] 1 MLJ 315, 316 per Mohamed Azmi J, as he then was). "The first and foremost consideration of punishment is the public interest. [Because] the object of punishing crime is .... also to deter others" (*Yap Teng Chai v. PP* [1959] MLJ 205, 206; see also *Reg v. WN Hammar* [1958] 24 MLJ 4).

In assessing sentence, all the circumstances of the offence should be considered (*Low Oi Lin v. R* [1949] MLJ 210). "The court in fixing the punishment for any particular crime, will take into consideration the nature of the offence, the circumstances in which it was committed, the degree of deliberation shown by the offender, the provocation which he received if the crime is one of violence, the antecedents of the prisoner up to the time of the sentence, his age and character" (*Mohamed Jusoh bin Abdullah & Anor v. PP* [1947] MLJ 130, citing *Halsbury's Laws of England* (Hailsam Edition) vol 9, para 365). "Courts are duty bound to consider all these matters before deciding upon a suitable sentence" (*Joginder Singh v. PP* [1984] 2 MLJ 133 per Ajaib Singh J as he then was). The sentence must be one appropriate to the gravity of the offence (*Lee Yoke Choong v. PP* [1964] MLJ 138). The sentence should reflect the seriousness of the offence (*PP v. Khairuddin* [1982] 1 MLJ 331).

Mitigating factors are not to be disregarded, even if the offence calls for a deterrent sentence (*Lee Peng Kong v. PP* [1986] 2 CLJ 139; [1986] CLJ (Rep) 437). That is not to say that "the circumstances of the individual offender are more important than the protection of innocent members of the community from injury to their persons, or from risk even to their lives" (*R v. Murukaiyan Rasoo (supra)).* Public interest must not be relegated to the background. "The correct approach is to strike a balance, so far as possible, between the interest of the public and the interest of the accused" (*PP v. Loo Choon Fatt* [1976] 2 MLJ 256, 258 per Hashim Yeop A Sani J, as he then was; see also *PR v. Adam bin Mohamad* [Mallal's Digest 4th Edn 1997 Revised para 2908] and *PP v. Mohd Nooh bin Yusof & Ors* [Mallal's Digest *ibid* para. 2918].

"A court has the discretion to be lenient and merciful provided there are extenuating circumstances **and it is in the public interest to do so**" (*PP v. Khairuddin*). (emphasis added)

The learned DPP was right of course about the seriousness of the offence, for the taking of a human life is a most grave and serious crime. The punishment must fit that crime. The sentence must reflect the gravity of that crime. A lenient sentence is definitely out of the question. Given the gravity of the offence in which the maximum punishment is a term of imprisonment of 20 years, even a first offender could not be let off without a term of imprisonment of what should be a good several years. Yes, the plea of guilt is a strong mitigating factor. And yes, judicial time has been saved. But there are no extenuating circumstances for the court to be merciful. Rather, it would appear from the facts, that the accused together, could have overpowered the deceased and relieved him of his wares without them first having to take their victim's life. But both accused showed they had no respect for life. While one held onto the deceased, the other stabbed the deceased on his throat, with an ice pick, an implement which when thrust at the throat to injure could only cause life-threatening wounds. On balance, in both cases, in the opinion of the court, the right and proper punishment is a term of imprisonment of nine years. In the case of OKT2, the sentence shall commence from the date of his arrest. As for OKT1, who for a similar offence was just sentenced by this court, in Criminal Trial 45-8-00, to serve a term of imprisonment of nine years with effect from the date of his arrest, the sentence "shall commence either immediately or at the expiration of the imprisonment to which he has been previously sentenced" (s. 292(i) of the Criminal Procedure Code).

The law regarding the position of a prisoner who has received more than one sentence of imprisonment is found in ss. 282(d) and 292 of the Criminal Procedure Code. "The effect of these sections is that unless the court imposing the sentence says anything to the contrary, the sentence runs from the date on which it was passed. If it is intended that it should run not from the date it was passed, but from the expiration of some other sentence whether by the same court at the same time or imposed by another court or at any time, then the court must make an order accordingly. If this is done, it should be done at the time the sentence is imposed" (Practice Note No 7 of 1961; see also *Ooi Sim Yim v. PP Ooi Sim Yim v. PP* [1990] 1 CLJ 435; [1990] 1 CLJ (Rep) 223). "[Section 292] gives a discretion to the court, depending on the facts and circumstances of each particular case, ... to order the commencement of the sentence ... either immediately or at the expiration of the imprisonment to which [the prisoner] has been previously sentenced" (*PP v. Ooi Wang San* [1998] 3 CLJ 270, per Shaik Daud Md Ismail JCA). One or the other, the court awarding the sentence must give its direction.

There is no rule of law or practice which prohibits cumulative sentences in the case of a first offender (see *Sia Soon Kia v. R* Mallal's Digest 4th edn, 1997 Reissue, vol 5 para 2585). But "sentences should not be ordered to run consecutively unless there are some good grounds for so doing" (*Hyder v. Rex* [1949] MLJ 121 per Gordon-Smith Ag CJ). Unless there are reasonable grounds for directing otherwise, "sentences of imprisonment should run concurrently, where it is reasonable to conclude that the second charge is really subsidiary to the first charge" (*Ooi Sim Yim v. PP (supra)*; see also *PP v. Yap Huat Heng* [1985] 2 MLJ 414) or where offences are committed in the course of a single transaction (*Maideen Pillai v. PP* [1996] 1 SLR 161). "It is not possible to frame a comprehensive formula of universal application to determine whether two or more acts constitute the same transaction; but circumstances which must bear on the determination of the question in an individual case may be easily be indicated: they are proximity of time, unity or proximity of place, continuity of action and continuity of purpose or design" (*Amrita Lal Hazra v. Emperor* 42 Cal 952; in *Chin Choy v. PP* [1955] MLJ 237, the Court of Appeal held that the best test which has been laid down in considering this matter is contained in *Amrita Lal Hazra v. Empero*r; see also *Mohamad Akmar bin Mansor v. PP*, Mallal's Digest 4th edn, 1997 Revised, para 2573). But even if the offences are committed in quite separate transactions, it is still a guiding principle that the aggregate sentence imposed on an offender should not exceed the normal level of sentences given for the most serious of the individual offences involved, and that the total sentence should not be a crushing sentence not in keeping with the offender's record (*Maideen Pillai v. PP (supra)*).

OKT1 committed the offence in 45-8-00 between 9.30pm to 11pm on 10 July 1999 at Kawasan Ladang Kelapa Sawit Kg Sri Tanjung, Renggam, Kluang. Five days later at a different place altogether, OKT1 committed the present offence, ie, between 10.30am to 11.50am on 15 July 1999 at Ladang MCA Layang-Layang, Kluang. Plainly, beyond all argument, OKT1 committed two distinct and separate offences. This is definitely a case in point where it could not be said that sentences should not be ordered to run consecutively. Indeed, there is no alternative to a consecutive sentence, for if the sentence for the present offence is to commence immediately, it would work out that OKT1, the offender who thrust the ice pick into the throat of the deceased, would not be punished at all for his ghastly act. And that would not be just, given the unquestionable gravity of the present offence which could not go unpunished. Granted, a consecutive sentence means that OKT1 will be imprisoned for 18 years from the date of his arrest. Yet that aggregate sentence will not exceed the maximum permissible punishment for any one offence.

That aggregate sentence will be in keeping with OKT1's frightful record of two culpable homicides. Therefore, the direction of the court is that the sentence imposed on OKT1 for the present offence shall run from the expiration of the sentence in 45-8-00.